MANAGER, TUBORG (M) SDN. BHD.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[CRIMINAL APPEAL NO. 177 OF 1988]
3 FEBRUARY 1990

CRIMINAL PROCEDURE: *Statutory offence - Strict liability - Charge under s. 13(1) of the Food Act 1983 - Relevant provisions read together with s. 13(1) - Authorised officer - Notice - Agency -'Foreign matter' - Reasonable steps.*

EVIDENCE: *Locus in quo - Simple view of witnesses in attendance - Evidence must be recorded - Decision arrived must be based on recorded evidence.*

Section 28 of the Act imposed a presumed constructive criminal liability on manufacturers whose marked, labelled and unopened products are found to be adulterated or to contain **foreign matter**. The constructive liability will only apply when the food is sold in unopened packages. And as a means of ensuring fair opportunity to the seller and manufacturer, s. 6(1) of the Act prescribes the mandatory provision for a notice to be given by the authorised officer to the seller, his agent or servant, and to the manufacturers themselves, of his intention, to have the sample of food analysed.

In the last resort, s. 28 allows the manufacturers to raise the defence that he did not act wilfully and that he had taken all **reasonable steps** to ascertain that the preparation of the food for sale had been carried out properly.

The appellant in this case was found guilty and convicted of an offence under s. 13(1) of the Act. The appellant was accused of selling to one health inspector, (PW2), a bottle of Tuborg beer containing fungal growth. On appeal, the High Court Judge allowed the appeal and held as follows.

Held:

[1] An off duty health officer who was privately visiting a clubhouse to play "Tombola" cannot be said to be an 'authorised officer' within the meaning of the Act on the ground that at that instance, he was not acting in the course of his duty.

[2] The argument that oral notice had been given to the appellant, should not be accepted as agency, is implied constructively through s. 28, it is for the prosecution to prove that the beer was obtained through the seller. Here every purchase was acknowledged by receipt which was issued in the club's name and that the club would be the seller of the beer. The club bought the beer to resell it to their members and constructively the agents for the appellant on whom the notice should be given.

[3] The condition of the beer bottle itself, whether opened or unopened, when found, is an important issue. Here, in the light of the various contradictions between the two prosecution's witnesses, as to the condition of the bottle itself, the learned Magistrate should have required **further clarification** before accepting their evidence.

[4] The charge under s. 13(1) of the Act, accused the appellant of selling to one health inspector, a bottle of Tuborg beer containing fungal growth, whereas the relevant term used in that section is 'foreign matter'. The charge was therefore incorrect as it failed to specify that the fungal growth was a matter foreign to the Tuborg beer.

[5] What is to be considered as reasonable step as stated in s. 28 of the Act is a question of fact to be considered by the trial Magistrate, depending on the circumstance of each case but what he has to bear in mind in arriving at any conclusion is that the offence being a constructive as distinguished from strict liability offence, the onus of rebutting this presumed liability is considerably lighter.

[6] The adverse inference drawn by the learned Magistrate after a *locus in quo* whereby he had deduced that the manufacturer had not taken reasonable steps to ensure the efficiency of the bottle scanning was unwarrantable because the facts referred and acted upon by the learned Magistrate do not appear to form part of his recorded evidence.

[7] A *locus in quo* may either be a simple view of an object or place or a view with witnesses in attendance and giving oral evidence or demonstration. In the first case no evidence need be recorded but evidence should have been recorded in the second case in respect of words spoken by the witness, as per Lord Denning in *Tameshwar and Anor. v. The Queen.*

[8] Before arriving at his decision to reject the defence under s. 23, the learned Magistrate should have recalled one of the defence's witness to record from that witness, not only the evidence pertaining to the issue of reasonable steps, but also to provide him with the necessary chance to explain when or why the second optic scanning machine was installed.

[Appeal allowed, conviction quashed.]

Cases referred to:
The Manager, G.H. Long Bros. v. PP [1961] 27 MLJ 222
Tameshwar & Anor. v. The Queen [1957] AC 476
London General Omnibus Co. v. Lavell [1901] 1 Ch 135
Goold v. Evans & Co. [1951] 2 TLR 1189
Goh Ah San & Ors. v. The King [1938] MLJ
Harban Singh v. Regina [1954] 20 MLJ 158
Bennex v. Austin Motor Co. Ltd. [1955] All ER 326
Thomas v. Thomas [1961] 1 All ER 19

Legislation referred to:
Criminal Procedure Code, s. 218
Food Act 1983, ss. 4, 5, 6, (1), 8, 13(1), 23, 28

For the plaintiff - David Morais with Norita bt. Yahya
For the defendant - Ibrahim Taib

JUDGMENT

Wan Yahya J:

Section 28 of the Food Act 1983 *inter alia* imposes a presumed constructive criminal liability on manufacturers whose marked, labelled and unopened products are found to be adulterated or to contain foreign matter.

It appears to be a harsh provision of the law, if one considers that in most instances the products had ceased to be under their control or supervision for years. What more when we ponder over the long and unkindly passage taken by a beer bottle after leaving its place of manufacture until ultimately reaching the consumer. It could be sold and resold, conveyed and tossed over from place to place, stored in all kinds of places and subjected to various conditions and durations. Should the manufacturer be punished for something that could have happened after he had parted possession with his product and especially so when the

defects to such product could have been possibly due to the mishandling by the transient and ultimate possessor or those dealing with the product before it finally reached the consumer. That cannot be the intention of the legislature. What s. 28 of the Food Act seeks to do is to make manufacture of food liable, for what we could term as the manufactures' defects.

For that reason the Act lays down in s. 28 itself that the constructive liability will only apply when the food is sold in an unopened package. Under such conditions, it is practical to assume that the food had been prepared in the same condition as it was packed and the likelihood of anyone tampering with it becomes unlikely. Then as a means of ensuring fair opportunity to the seller and manufacturer, s. 6(1) of the Food Act 1983 prescribes the mandatory provision for a notice to be given by the authorised officer, who was either purchasing or otherwise procuring the samples of the food for analysis, to notify the seller, his agent or servant, and by virtue of the constructive liability imposed under s. 28, to the manufacturers themselves of such intention.

Subsection (2) of the same section goes on to prescribe the procedure to be followed when dealing with the samples. The procedure which was written in peremptory language appears in part III of the Food Regulation 1985 PU (A) 437.

The purpose of this statutory requirement is no doubt to provide the manufacturer with the earliest necessary opportunity of inspection, firstly to ascertain whether the package has been opened, secondly to obtain samples for purpose of their own analysis if they so wished.

Lastly, even if the manufacturer is unable to establish that the defects took place after the food were no longer in his control, s. 23 allows him to raise the defence that he did not act wilfully and that he had taken all reasonable steps to ascertain that the preparation of the food for sale had been carried out properly.

The rationale behind this section is that if it could be shown that the defect could not have been caused by manufacturer's default, then there is every likelihood that the defect could have been caused whilst retained by the subsequent retailer.

With these in mind I shall proceed to examine this case.

The evidence as recorded by the learned Magistrate shows that the complainant, an off duty Health Inspector (PW2) went to have a drink in the Sultan Abdul Samad Club of which he was not a member. On his order the caterer (PW1) served him with a bottle of Tuborg Beer. The account of events by these two witnesses thereafter differed. According to PW1, he left the bottle on the table and went to fetch a glass. On his return to the table, PW2 stopped him from opening the bottle because he had seen something in the bottle and wished to take it back to his department for checking. PW2 on the other hand said when PW1 arrived with the bottle and was about to open it, he (PW2) noticed something floating inside the bottle. He then held it against a fluorescent light and inverted the bottle to ascertain that the cap was 'strong'. There was leakage from the bottle.

Anyway the beer was paid for; but PW2 did not take the receipt until the following day. The bottle of beer was taken to the Health Office, Banting on the following day where it was sealed and sent to the chemist. No notice or any sample was given to the appellant.

The chemist's analytical report states that "a lumpy matter floating inside the bottle was found to consist of fungal growth by microscopic examination.

On the issue regarding the notice to be given under s. 6 of the Food Act 1983, the respondent concedes that no notice was given to the appellant by PW3, the authorised officer, but they nevertheless contend as PW2 is a health inspector, he is an authorised officer. PW1 according to the respondent, is an agent of the appellant. By this process of deduction they therefore argued that an oral notice had been given to the appellant.

I am unable to accept the argument. To start with, an off duty health officer who was privately visiting a clubhouse to play 'Tombola', cannot be said to be an authorised officer within the meaning of the Act. PW2 in this instance was not acting in the course of his duty. He was therefore not authorised during his off hours to raid premises, stop, detain and search vehicles or seize any property. Likewise he could not whilst not on duty, take samples and inform the seller of the goods about his intention to send the sample for analysis or perform any of those powers specified in ss. 4, 5, 6 and 8 of the Act. Off hours here does not mean the period outside working time but the hours when he is not on duty. I think there is a difference between the term doing something in line with duty and in the course of duty. What PW2 was doing here is in line but certainly not in the course of his duty. To my mind he was not at that time, an authorised officer and was therefore in no position to take samples or notify the seller under s. 6(1) that he was going to send the same for analysis.

As for the contention on agency, Counsel for the respondent referred to s. 28 of the Act and submits that agency, as it is with liability, is constructive under this section. She cited: *The Manager, G.H. Long Bros. v. PP* [1961] 27 MLJ 222. With respect if such a construction is to be applied against the manufacturer through the seller, who is to be constructively held as his agent, then it would be necessary to examine judiciously the factual circumstances affecting the entire transaction leading to the sale of the offending product. The rationale in *G.H. Long's* case is based on the assumption that the information or notice under s. 6 would be transmitted to the manufacturers thus affording him the opportunity of inspecting the defective food, its package and contents as well as obtaining samples for his own analysis. But this may not be so, especially in cases where the ultimate seller himself had obtained the food from some invidious supplier or himself be responsible for the defect. Therefore any reasonable evidence tending to show that the seller is not an agent or that he is not the actual seller of the food could be accepted as sufficient rebuttal of this theory of constructive notice. To hold otherwise would be tantamount to widening the corridor of injustice. In the present era of competitive and often contemptible business rivalry and vexatious litigation, it is not improbable for the product of any manufacturer to be premeditatedly tampered with as a means of obtaining hush money or forcing an extortionate litigation.

As agency is implied constructively through s. 28, it is imperative that the prosecution must first of all prove that the food was obtained through the seller. The seller in this case would appear to be PW1. However, a closer scrutiny of his evidence raises doubts as to the identity of the persons who actually sold the beer.

Under cross examination he said:

> I was catering food and beer and other soft drinks. I prepare the food myself. I place the order for the drinks and the club will pay. Apart from Tuborg Beer I also sold Anchor Stout and Carlsberg. For Anchor Stout and Carlsberg, I place the order on the same person that is Mr. Soh Chin Lock.

And at the end of his cross examination, he stated:

> I don't know from which company Mr. Soh comes from. His shop was at Jalan Morib.

It would appear from the above paragraphs and the receipt which was issued in the club's name that the club could be the seller of the beer. They bought the beer to resell it to their members and constructively the agents for the appellant on whom the information under s. 6 of the Food Act should have been given.

The next point to be considered is on the condition of the bottle itself. When found, was it opened or unopened? Although it remained allegedly unopened in the possession of PW2 for 14 hours, no attempt was made to reach the appellant or his agents. The crucial evidence on this issue rests only on PW1 and PW2. Of course both said the cap of the bottle was intact but how exactly intact it was is a matter of some doubt.

The mistake on an order for a particular beer might have been discovered just as the pressure was being applied to open the bottle and if the cap has not been sufficiently dislodged, it could be recapped and returned to the fridge to await the next order. It is of course a mere possibility but all the same the seller is unlikely to disclose this especially if he faces the possibility of a criminal charge. The evidence of PW1 and PW2 therefore should have been thoroughly assessed by the trial Magistrate. In the light of the various contradictions between PW1 and PW2 on the actual production of the bottle and the alleged discovery of the dirt floating inside it as well as the differing evidence by PW3 and PW4 about the level and leakage of the bottle, the learned Magistrate should have required further clarification before accepting their evidence.

Perhaps I should mention at this juncture about the charge as well. The charge under s. 13(1) of the Food Act 1983 accused the appellant of selling to PW2 a bottle of Tuborg beer containing fungal growth, whereas the relevant term used in that section is 'foreign matter.' Likewise the chemist also mentioned fungal growth but nowhere in his evidence or for that matter in all the evidence of the prosecution, was it explained that the thing called fungal growth was a foreign matter in relation to the beer. The onus to prove that the fungus is foreign to the beer is on the prosecution and it should never leave its case unexplained to be complemented by the Court's imagination. After all, not many of us can determine whether maggots are foreign to a Blue Danish Cheese and there are still a number of Judges who remain unenlightened about the constitution of any particular kind of brew. The charge was therefore incorrect as it failed to specify that the fungal growth was a matter foreign to the Tuborg Beer.

Finally, inspite of these shortcomings in the prosecution's case, the appellant did put up a defence as envisaged under s. 23 of the Food Act. They showed that they have taken all reasonable steps in the brewing and bottling of the beer. Evidence was introduced to show that the bottles were purchased from reputable suppliers; that rigorous sampling and inspection of the bottles were done visually and by optic scanning and the last method is reputed to have a 99% efficiently rating. The bottles are then filled and are subjected again to two visual inspections.

What is to be considered as reasonable step is a question of fact to be considered by the trial Magistrate, depending on the circumstances of each case but what he has to bear in mind in arriving at any conclusion is that the offence being a constructive as distinguished from strict liability, the onus of rebutting this presumed liability is considerably lighter. In our present case, the prosecution was unable to adduce from cross examination of the appellant's witnesses, any signs of imperfection in their system of manufacture. The only evidence by expostulation to the appellant's case came earlier from PW5, a research officer from MARDI, who had agreed with the suggestion that the bottle must have chipped whilst going through the process of capping. However, it was never established that this witness

is an expert. Neither was any suggestion made that he was giving evidence in that capacity nor was it claimed that his evidence as an expert had been accepted in any Court. In his grounds of judgment the Magistrate neither mentioned nor referred to this witness's evidence. Such omission to my mind reflects on the Magistrate's reluctance to accept him as an expert witness. His evidence therefore had provided no assistance to the prosecution's case.

The learned Magistrate specified two grounds for rejecting the defence. The first was based on his discovery, during a *locus in quo*, of a second optic scanning machine. He deduced that the reasonable step to ensure the efficiency of the bottle scanning procedure had commenced only from the date the second machine was installed. As he was not informed of that date he drew an adverse inference that the procedure must have been ineffective at the time when the bottle was capped.

I am compelled to say that the inference drawn by the learned Magistrate was unwarrantable especially so when the facts referred to and acted upon by him do not appear to form part of his recorded evidence. Although there was apparently an invitation made by the defence Counsel and an acceptance by the learned Magistrate to visit the Carlsberg factory, nothing else were recorded in the notes of evidence.

A Magistrate when conducting a summary trial is performing the function of Judge and jury. Thus he has the same powers, as a Judge, sitting alone or with a jury, to view the scene under s. 218 of the Criminal Procedure Code. This *locus in quo* may either be, as described by Lord Denning in *Tameshwar & Anor. v. The Queen*, [1957] AC 476, a simple view of an object or place or a view with witnesses in attendance and giving oral evidence or demonstration. In the first case no evidence need be recorded but in the second one the words spoken by the witness form part of the evidence and should have been recorded. At p. 484 of the judgment in *Tameshwar v. The Queen* (*supra*) Lord Denning said:

> It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid, as the witness points to the very place where he stood. It is more dramatic, as he reenacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this," and, unless held in check, he will start to give his evidence all over again as he remembers with advantage what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case.

Similarly in *London General Omnibus Co. v. Lavell* [1901] 1 Ch 135 at 138 Lord Alverstone said:

> ... a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the Judge of the subject matter of the action ... I should be very sorry to endorse the idea, that a Judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence.

As there was no record of what took place at the appellant's factory or what had happened in Court subsequently, I can only assume that the learned Magistrate's comments about the newly installed optic scanning machine were elicited from his questioning of witnesses during his visit to that factory. Although it was not strictly an issue in dispute between the parties, the learned Magistrate must have nevertheless felt that it was a relevant matter to be considered. In fact it is one of the two reasons he gave for rejecting the defence of reasonable

precautionary measures taken by the appellant to ensure the perfection of their products. Albeit, it is an uncontemplated issue on which the appellant had neither notice nor the opportunity to explain or reply. What would have been the proper and surely a just procedure was for the Magistrate to recall the witness DW2 and to record from him not only the evidence pertaining to the issue but also to provide him with the necessary chance to explain when or why the second optic scanning machine was installed. In this regard, Lord Denning expressed the following view in *Goold v. Evans & Co.* [1951] 2 TLR 1189 at 1191:

> It is a fundamental principle of our law that a Judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply. The Judge must make his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a Judge goes by himself to see some public place, such as the site of a road accident, with neither party present.
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> The usual procedure at a view is that nothing is said by either party unless the Judge asks for an explanation or demonstration. Usually, both parties behave so fairly that there is no dispute. But if there be a dispute as to the explanation or demonstration, there is only one way of resolving it, and that is by taking evidence and letting witnesses be cross-examined on it.

Again in *Thomas v. Thomas* [1961] 1 All ER 19, the justices dismissed an application by a husband to vary a maintenance order on grounds of their previous experience "that if pressure is brought to bear the (husband) makes an effort to comply with the order. It was held that the justices were not entitled to take into consideration their previous experience in dealing with the husband without having referred in open Court to the previous proceedings and given the husband an opportunity to deal with those proceedings and any inferences to be drawn therefrom.

The above principle is also to be found in our Malaysian case laws. In *Goh Ah San & Ors. v. The King* [1938] MLJ. McElwaine CJ at p. 95 said:

> If anything is said which goes beyond what is reasonably necessary in indicating a place referred to or implied in the evidence and which might be regarded by the Magistrate as evidence, the person (unless he is an accused who has not given evidence) should be called or recalled for examination on cross-examination on the point on return to Court.
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> ... But I do not think it safe to lay down any rigid rule for the conduct of a view. Something must be left to the Magistrate's discretion and so long as everything said or done is said or done openly in the presence of the accused and his Counsel and is interpreted to the accused, if necessary, and so long as any new matter or new aspect arising during the view is tested by examination or cross-examination on return to Court there would be no irregularity in the trial nor would there be any ground for suspecting that justice did not appear to be done.

Another CJ, Murray-Aynsley in *Harban Singh v. Regina* [1954] 20 MLJ 158 summed up the principle in his 8 lines judgment as follows:

> In this case the Magistrate had a "view" in the absence of the appellant after the conclusion of the evidence. He then formed certain opinions on which his judgment seems to have been largely based. If the "lay out" was of importance I think evidence should have been produced on the subject. The defence would then have had an opportunity to deal with the matter.

The second reason by the learned Magistrate for rejecting the appellant's defence under s. 23 must likewise be rejected. In the course of his evidence, DW2, the packaging manager of Carlsbery Brewery which also manufactures Tuborg, under contract stated the following in connection with the optic scan machine:

> The prescribed efficiency is 99%. Error margin is 1%. The machine is regularly inspected by the engineering department and the production department. It is done every 2 hours.

The question of inspection and calibration were neither raised nor challenged in the cross examination and neither was any explanation or clarification required by the Court.

At that stage of proceedings, therefore, the fact that the machine was inspected and caliberated every two hours and therefore had a 99% efficiency had not been disputed by the prosecution. If, despite this conceding fact by the prosecution, the learned Magistrate for any peculiar reason, felt that he could not accept the fact on 2 hourly calibration, then the proper thing for him to do was to have asked the witness to produce the records of inspections. If the appellant was unable to furnish him with the required records, then he was entitled to reject the fact and draw his own inference. Even so he must always bear in mind that the onus of rebutting a constructive liability as in this case rests on the balance of probability. To succeed in his defence under s. 23 the manufacturer need only show that he has taken reasonable measures to prevent the products for sale of adulterative food under s. 13. He need not prove that his method of production is 100% safe.

It has often been said that the appellate Court should be slow in interfering with the findings of fact by a lower Court but where such findings are based on wrongful or unjust inferences drawn by the trial Judge, then the appellate Court would be abrogating its functions if it refuses to review the findings of the lower Court. - See *Bennex v. Austin Motor Co. Ltd.* [1955] All ER 326.

The inferences drawn in the present instance are wrongful, unjust and unsustainable.

For the above reasons, I allow this appeal and quash the conviction. The fine, if paid, is to be refunded to the appellant.

Also found at [1990] 1 CLJ 790